In Pilgrim's view, BellSouth's argument is inviting the Commission to peer through the wrong end of the looking glass. The question is not whether ILECs and non-ILECs are identically situated with regard to the CPP call (as BellSouth would frame the issue), but whether ILECs and non-ILECs are identically situated with regard to the nature and extent of billing and collection resources they control. Clearly, they are not.

The Supreme Court has held that, as long as the agency offers a reasoned explanation for its action, based upon the evidence before it, the decision will not be considered arbitrary and capricious. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983), *cited in* Adams v. Environmental Protection Admin., 38 F.3d 43, 49 (1st Cir. 1994) ("A court should not set aside agency actions as arbitrary and capricious unless the actions lack a rational basis."). The courts have also held that, when there are demonstrable differences between parties subject to regulation by the same agency, different regulatory treatment is permissible. *See* SRS Technologies v. United States, 894 F.Supp. 8, 12 (D.D.C. 1995).

In view of the evidence before the Commission in this proceeding, BellSouth cannot make a showing that requiring ILECs to provide billing and collection as a UNE, but not imposing a similar requirement on other carriers, would lack a rational basis. BellSouth's comments disregard the ILECs' market power regarding CPP billing and collection as well as the specific intent of Congress and the Commission to move toward a new competitive model, and, in doing so, to open up access to the ILECs' monopoly-controlled networks. *See, e.g., Local Competition Order*, 11 FCC Rcd at 15505 (para. 1) (the 1996 Act abandons reliance upon regulated monopoly networks and instead "requires telephone companies to open their networks to competition."). Section 251 of the Act is intended to apply special duties and obligations to ILECs based upon their market power. Through their market power, ILECs acquired economies of density, connectivity, and scale that gave them competitive advantages in local exchange markets. *See id.*, 11 FCC Rcd at 15508 (para. 11). ILECs continue to exercise significant power in the CPP billing and collection market, based upon their widespread service areas and the commanding size of their customer bases. Non-ILECs are not similarly situated, in that they do not control a billing and collection apparatus of sufficient size and scope to provide them with market power with regard to furnishing billing and collection for CPP. It is this difference in market power between ILECs and non-ILECs with regard to CPP billing and collection that justifies a public policy under which ILECs are obligated to provide CPP billing and collection as a UNE under Section 251, while non-ILECs may (in the Commission's discretion) be spared any similar obligation that could be imposed through an exercise of the Commission's ancillary jurisdiction.

[117] The Commission sought comment in the *CPP Rulemaking Notice* regarding whether billing and collection information should be made available as a UNE under Section 251(c)(3) of the Act, and also noted that it planned to apply criteria developed in actions taken by the Commission in another proceeding based upon the *UNE Second Notice* for purposes of determining whether such information should be unbundled under the "necessary" and "impair" standards in Section 251(d)(2) of the Act. *CPP Rulemaking Notice* at para. 66 (citing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (*UNE Rulemaking Proceeding*), Second Further Notice of Proposed

(continued . . .)

Two issues arise in examining whether the Commission should take such an action. First, it must be determined whether billing and collection falls within the statutory definition of "network element," thus subjecting billing and collection to the provisions of Section 251(c). Second, if billing and collection can reasonably be classified as a network element, then the Commission must determine whether public policy requires the availability of billing and collection on an unbundled basis in accordance with the terms of Section 251(d).

1. Billing and Collection Is Included in the Statutory Definition of "Network Element"

The statute defines "network element" to mean:

> a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.[118]

On the face of this statutory language it is reasonable to classify billing and collection service as a network element, since the service constitutes a feature, function, or capability that is provided by a facility or equipment that in turn is used in the provision of a telecommunications service. Facilities or equipment used to provide a telecommunications service must reasonably be considered to include those facilities and equipment that are used to bill and collect for the serv-

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Rulemaking, FCC 99-70, released Apr. 16, 1999) (*UNE Second Notice*)). The *UNE Second Notice* was adopted by the Commission in the wake of a remand decision by the Supreme Court in AT&T v. Iowa Utils. Bd., 119 S.Ct. 721 (1999) (*Iowa Utilities Board*). The Commission adopted rules based upon the *UNE Second Notice* in an action voted by the Commission on September 15, 1999. *See* Federal Comm. Comm'n News Release, "FCC Promotes Local Telecommunications Competition," Sept. 15, 1999. This Order has not yet been released by the Commission.

[118] Section 3(29) of the Communications Act, 47 U.S.C. § 153(29).

ice. Telecommunications services are defined by the statute as offerings of telecommunications for a fee.[119] In order to offer telecommunications for a fee, the telecommunications carrier must have the capacity to bill and collect for the offering. Thus, this fee collection capability is incorporated into the meaning of the term "telecommunications service," making billing and collection a feature, function, or capability that is provided by a facility or equipment used to provide the service.

Such a reading of the definition of "network element" gains further strength from the manner in which the Supreme Court has interpreted the statutory term. The Supreme Court has found that:

> Given the breadth of this definition [of "network element"], it is impossible to credit the incumbents' argument that a "network element" must be part of the physical facilities and equipment used to provide local telephone service. Operator services and directory assistance, whether they involve live operators or automation, are "features, functions, and capabilities . . . provided by means of" the network equipment. OSS [operational support systems], the incumbent's background software system, contains essential network information as well as programs to manage billing, repair ordering, and other functions.[120]

The Supreme Court has thus endorsed a broad reading of the statutory term, and has specifically concluded that a network element does not need to be part of a physical facility or equipment.[121]

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[119] Section 3(46) of the Communications Act, 47 U.S.C. § 153(46).

[120] *Iowa Utilities Board*, 119 S.Ct. at 734.

[121] Pilgrim also believes that the Commission's interpretation of the definition supports our view that it can include billing and collection. The Commission has indicated:

(continued . . .)

Moreover, we agree with PCIA that the specific reference to "information sufficient for billing and collection" in the definition of "network element" should not be read restrictively to exclude aspects of billing and collection other than the information necessary to bill and collect for telecommunications services.[122] Since, as we have already demonstrated, it is reasonable to construe billing and collection services as features, functions, and capabilities used in connection with the provision of telecommunications service, there must be some special reason to conclude that Congress, in noting that these features, functions, and capabilities "include" information sufficient for billing and collection, must also have intended to "exclude" billing and collection itself as a network element.

Although it is difficult to imagine such an interpretation, one might be persuaded at first blush that the canon of statutory construction, "*inclusio unius est exclusio alterius*,"[123] in fact requires such a reading of the definition. Under this maxim, the fact that Congress specifically included a number of features, functions, and capabilities in the definition would mean that Congress intended to exclude all other features, functions, and capabilities. The canon, however, is

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> We disagree with those incumbent LECs which argue that features that are sold directly to end users as retail services, such as vertical features, cannot be considered elements within incumbent LEC networks. If we were to conclude that any functionality sold directly to end users as a service, such as call forwarding or caller ID, cannot be defined as a network element, then incumbent LECs could provide local service to end users by selling them unbundled loops and switch elements, and thereby entirely evade the unbundling requirement in section 251(c)(3).

Local Competition Order, 11 FCC Rcd at 15633-34 (para. 263) (footnotes omitted).

[122] *See* PCIA Comments at 44 & n.115.

[123] The inclusion of one is the exclusion of another. The maxim is sometimes given as "*expressio unius est exclusio alterius*" — the expression of one is the exclusion of others.

given little force in the administrative setting, where courts defer to an agency's interpretation of a statute unless Congress has directly addressed the precise question at issue.[124] Moreover, "[i]t is universally held that this maxim is a guide to construction, not a positive command. . . . Whether the specification of one matter means the exclusion of another is a matter of legislative intent for which one must look to the statute as a whole."[125]

When looking at the Communications Act as a whole, one notices that, in cases in which Congress sought to specifically include enumerated items but also to exclude other items, it was careful to make that intention clear. For example, in defining the term "information service," Congress provided that the term:

> *means* the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, *and includes* electronic publishing, *but does not include* any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[126]

Thus, Congress made sure to be specifically clear on the face of the definition that its intent was not to include capabilities for managing telecommunications systems and services in the definition of information services. Similarly, nine paragraphs later in the same section of the Act, Congress could have specifically stated that the definition of "network element" does not include billing and collection. The fact that it did not choose to do so gives additional force to the con-

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[124] *See* Mobile Comm. Corp. v. Federal Comm. Comm'n, 77 F.3d 1399, 1404-05 (D.C.Cir. 1996), *cert. denied sub nom.* Mobile Telecomm. Technologies v. Federal Comm. Comm'n, 519 U.S. 823 (1996), *cited in Section 255 Order* at para. 104 & n.242.

[125] Massachusetts Trustees of E. Gas & Fuel Assoc. v. United States, 312 F.2d 214, 220 (1st Cir. 1963) (citing Springer v. Government of the Phil. Is., 277 U.S. 189 (1928)).

[126] Section 3(20) of the Communications Act, 47 U.S.C. § 153(20) (emphasis added).

struction that its listing of certain features, functions, and capabilities in the definition was not intended to be exhaustive.

Some opponents of a LEC billing and collection requirement offer up an interpretative argument in an effort to convince the Commission that billing information is outside the definition of "network element." Since these parties presumably intend this line of argument to encompass billing and collection as well as billing information, the merits of the argument should be explored here in the context of our discussion of the bases upon which the Commission should order the availability of billing and collection as a UNE.

Bell Atlantic, for example, presents the argument as follows: If a carrier purchases unbundled access to a physical element of a LEC network, then the carrier also is entitled to acquire features, functions, and capabilities of that element. On the other hand, Bell Atlantic argues, billing information, standing alone, is not a separate network element and therefore is not subject to any statutory unbundling requirements. Since, according to Bell Atlantic, CMRS carriers would not purchase any physical elements of the telephone network on an unbundled basis to handle CPP calls, they are not entitled to any billing information as a UNE.[127]

But, as we have discussed,[128] the Supreme Court has concluded that "it is impossible to [argue] that a 'network element' must be part of the physical facilities and equipment used to provide local telephone service."[129] Bell Atlantic seems to maintain that, since billing informa-

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[127] Bell Atlantic Comments at 8. *See* Cincinnati Bell Comments at 8-9; GTE Comments at 36; NTCA Comments at 8-9; USTA Comments at i.

[128] See the text accompanying note 120, *supra.*

[129] *Iowa Utilities Board*, 119 S.Ct. at 734.

tion is defined as a feature, function, or capability that is provided *by means of* a network facility or equipment, then billing information loses its status as a network element if it is bought separately from the facility or equipment. It can remain within the circle of network elements, Bell Atlantic seems to suggest, *only* if it is bundled with network facilities or equipment.

Bell Atlantic does not attempt to explain how its interpretation can be squared with the ruling of the Supreme Court, and it is difficult to discern how this task could be accomplished. There simply is no basis for the argument that billing information (or billing and collection services) must move into or out of the definition of "network element" depending upon whether they are sought to be acquired in conjunction with a network facility or equipment. This linkage is a figment of Bell Atlantic's imagination, since it has no basis in the statutory definition.

Under that definition, a feature, function, or capability that is provided by means of a facility or equipment used in the provision of a telecommunications service *is* a network element. The definition does not say that network elements include features, functions, and capabilities provided by means of network facilities or equipment *but only to the extent they are acquired together with the facilities or equipment*. Bell Atlantic is asking the Commission to read that language into the definition, but there is no basis for doing so. Once a feature, function, or capability is defined as a network element, there is no way to "undefine" it. And, once the feature, function, or capability fits within the definition of a network element, it becomes subject to the provisions of Section 251.

2. Billing and Collection Should Be Made Available on an Unbundled Basis Pursuant to the Criteria Established in Section 251 of the Act

We next turn to the question of whether public policy requires that, pursuant to Section 251(d), billing and collection must be made available as an unbundled network element. Section

251(d)(2) provides that "in determining what network elements should be made available . . ., the Commission shall consider, at a minimum, whether . . . (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[130]

Pilgrim agrees with PCIA's analysis that ILEC billing and collection services cannot be considered to be proprietary, which leads to the conclusion that the "necessary" standard of Section 251(d)(2)(A) is not applicable to an evaluation of whether billing and collection should be made available on an unbundled basis.[131] We also agree with PCIA's assertion that the lack of access to the billing and collection element by CPP providers would satisfy the "necessary" standard if the standard were applicable.[132]

In the *UNE Rulemaking Proceeding* Pilgrim proposed the following standard for purposes of deciding whether access to a network element should be provided under the "impair" standard of Section 251(d)(2)(B):

> *A competitor's ability to provide communications services is materially impaired if the denial of access to a UNE causes (1) an increase in costs or a decrease in quality that is not inconsequential or unimportant; or (2) a change in the way the competitor provides its service or conducts its business.*[133]

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[130] 47 U.S.C. § 251(d)(2).

[131] *See* PCIA Comments at 47 (characteristics of ILEC billing were developed as a result of ILECs' status as monopoly local exchange service providers, and are not due to "particular capital investments, unique proprietary software or research and development efforts.").

[132] *Id.*

[133] *UNE Rulemaking Proceeding*, Pilgrim Comments, filed May 26, 1999, at 15 (italics added).

Given the pivotal importance of ILEC billing and collection to the viability of CPP, it is reasonable to conclude that CMRS carriers would suffer the impairment defined by Pilgrim's proposed test if billing and collection were not made available as a UNE. There is overwhelming and incontrovertible evidence in the record of this proceeding that the cost of providing CPP would be higher in the absence of ILEC billing and collection. If CMRS providers were to attempt to offer CPP without ILEC billing and collection, the quality of the service would be impaired because, for example, the service might not be made available in areas in which ILECs refuse to bill and collect (since the CMRS carrier would have insufficient alternative means of billing and collecting from calling parties in those areas). The overall quality of a CMRS carrier's services would also be decreased if, for example, the carrier chose not to offer CPP at all due to the unavailability of ILEC billing and collection.

Similarly, the way in which the CMRS carrier provides its service or conducts its business would be impaired by lack of access to ILEC billing and collection for the reasons we have illustrated. The nature in which the carrier provides its CPP offering would likely be degraded if the carrier were forced to rely upon non-ILEC billing and collection arrangements. Ultimately, the offering would not be sustainable in the marketplace because of the prohibitive costs associated with non-ILEC billing and collection.

Recognizing the Commission's intent to apply criteria developed in the Order adopted last month[134] to the issue of whether billing information should be made available on an unbun-

[134] See note 117, *supra*.

dled basis,[135] we urge the Commission also to consider the advisability of making billing and collection services for CPP available as UNEs, and we endorse PCIA's conclusion that, "under virtually any reasonable reading of the statute, and under any conceivable criteria the FCC has adopted, the FCC will be able to determine that ILEC billing and collection services should be identified as a network element to be unbundled under Section 251(d)(2) . . . ."[136]

V. THE COMMISSION SHOULD ADOPT ITS PROPOSAL FOR CALLING PARTY NOTIFICATION

The fundamental changes that CPP will make to the conventional means of billing for wireless calls[137] make it important for the Commission to ensure that consumers are advised of these changes, and that calling parties are provided with sufficient information and opportunity to decide whether to incur charges by placing calls to CPP subscribers. The issue is significant both from the perspective of consumer protection and from the perspective of the workability and marketability of the CPP offering. The Commission bears a responsibility to ensure that carrier practices do not harm or disadvantage consumers, and that consumers can avail themselves of carrier facilities and services armed with the tools needed to make intelligent, informed decisions. The other side of this same coin is the fact that, if CPP is brought to the marketplace without sufficient features and safeguards to provide these consumer protections, then not only will consumers be harmed, but CPP ultimately will not gain consumer acceptance and will fail in the marketplace.

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[135] *CPP Rulemaking Notice* at para. 66.

[136] PCIA Comments at 46-47.

[137] *See CPP Rulemaking Notice* at para, 42; Joint Parties Comments at 6-7.

These considerations led the Commission to fashion a strong and effective proposal for calling party notification. The Commission's proposal has garnered endorsement from a significant cross-section of commenters. Pilgrim believes that the Commission should press forward to adopt its proposal for a nationwide notification system, and at the same time should reject suggestions made in the record for alternative mechanisms that would not serve as well as the Commission's proposal to protect consumers and secure the marketability of CPP.

A. There Is Strong Record Support for a Nationwide Notification System

As Pilgrim noted in our comments,[138] a uniform, nationwide method for informing calling parties through a recorded message that they are placing a call to a CPP subscriber has two principal advantages, in contrast to an approach that would permit state-by-state (or carrier-by-carrier) differences or variations in the form or content of the message.[139]

A uniform notification system will benefit consumers because it will ensure that all consumers are protected by the notification requirements prescribed by the Commission, and will also minimize any customer confusion that could be engendered by different notification messages required by different States or implemented by different carriers. Moreover, a uniform, nationwide system would be easier and less expensive for carriers to implement, which in turn would tend to facilitate the nationwide CPP offerings. Thus, less expensive and more widely available CPP services could be provided to consumers.

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[138] *See* Pilgrim Comments at 39.

[139] We do suggest that the Commission, in adopting a uniform recorded notification text, should also permit carriers to make additions to the text to inform calling parties about additional billing options or enhanced service options that are available for contacting the called party. See Section V.B.3, *infra*. We believe that such additions would serve to better inform and protect consumers.

These advantages of a uniform, nationwide notification system have been widely recognized in the record.[140] PCIA, for example, points out that "a national approach to notification would support the large-scale implementation of CPP throughout the country and likely reduce the costs and complexity of providing whatever CPP notifications the Commission deems necessary."[141] Moreover, we agree with the concerns raised by AirTouch that:

> [a]bsent uniform [notification] requirements, . . . carriers could be required to develop and install a wide variety of software in their switches to handle different state-mandated notification messages or methods, train and educate customer care representatives on the variety of notification messages, and therefore lose some of the efficiencies gained from a multi-state regional service structure, vastly increasing the costs of CPP.[142]

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[140] *See, e.g.*, AARP Comments at 3; AirTouch Comments at 39; AT&T Comments at 5 ("if each state is allowed to impose its own requirements, the resulting confusion would pose a potentially insurmountable barrier to mass acceptance of CPP and dramatically increase carrier costs"); Bell Atlantic Comments at 2; Cable & Wireless Comments at 2; Federal Trade Commission (FTC) Comments at 12; GTE Comments at 16, 22; Motorola Comments at 5; NTCA Comments at 2; PCIA Comments at 24; Qwest Comments at 6; RTG Comments at 3; Sprint Comments at 2; USCC Comments at 6; University of Michigan (Michigan) Comments at 1, 4; US West Comments at 2. *See also* Florida PSC Comments at 3 (supporting the preservation of State jurisdiction, but expressing uncertainty regarding whether additional State-specific notification requirements could be implemented as a practical matter due to technical limitation); Nextel Comments at 7, 10 (opposes a verbal notification, but notes that, if the Commission adopts such a requirement, it should be applied uniformly throughout the Nation); Wisconsin Public Service Commission (Wisconsin PSC) Comments at 3 (welcoming "the invitation the FCC has offered states to cooperatively establish the notification standards"). *But see* California Comments at 3-4 (Commission should establish minimum notification standards that States could augment); Celpage Comments at 6; Leap Wireless International (Leap) Comments at 9; Ohio PUC Comments at 9; USTA Comments at 11; Washington UTC Comments at 3.

[141] PCIA Comments at 24.

[142] AirTouch Comments at 39-40.

Moreover, Pilgrim agrees with those commenters who have argued that the Commission has ample statutory authority to establish a uniform, nationwide framework for notification.[143] We thus urge the Commission to conclude that there is sufficient record support, as well as a sound statutory and public interest basis, for the Commission to proceed with the prescription of such a notification system.

B. The Proposed Notification System Will Protect Consumers Without Imposing Unnecessary Burdens or Costs Upon Wireless Carriers

Although a number of parties rehash in their comments some of the objections they had raised in earlier pleading rounds regarding the scope and contents of any notification message, the four-point calling party notification proposed by the Commission in the *CPP Rulemaking Notice*[144] has received substantial support in the record.[145] We address in the following sections the record support for specific aspects of the Commission's proposal, as well as the support for specific suggestions Pilgrim made in our comments.

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[143] *See* AirTouch Comments at 40; Bell Atlantic Comments at 3; CTIA Comments at 10-11; PCIA Comments at 25-27; Qwest Comments at 6; Sprint Comments at 2.

[144] The Commission proposed to develop a uniform, verbal notification announcement that would include the following elements: (1) an indication that the calling party is making a call to a CPP subscriber and will be billed for airtime charges; (2) an identification of the CMRS carrier; (3) a specification of the per minute rate and any other charges that the calling party will be charged; and (4) notice that the calling party may terminate the call before incurring any charges. *CPP Rulemaking Notice* at para. 42.

[145] *See, e.g.*, Bell Atlantic Comments at 2; California Comments at 9-10 (California has not required mandatory notice of per minute rates or other charges in its rules, but does not object to this Commission proposal); Celpage Comments at 6-7 (although Celpage does not support a nationwide notification system, if the Commission chooses to adopt such a system, then Celpage supports the four elements proposed by the Commission); CPI Comments at 4; Connecticut DPUC Comments at 4; FTC Comments at 12; Florida PCS Comments at 3; NTCA Comments at 2; RTG Comments at 3; SBC Comments at 11; Wisconsin PSC Comments at 3.

1. The Provision of Specific Rate Information Is the Best Way To Safeguard Consumer Interests and Can Be Accomplished in a Manner That Minimizes Carrier Burdens

Pilgrim believes that a critical aspect of a successful and effective calling party notification message is the provision of specific information regarding rates that the calling party would be charged if the call to the CPP subscriber is completed.[146] The provision of this information will enable calling parties to decide whether they wish to complete the call and incur the associated expenses. Making specific rate information available in the notification also should have the effect of minimizing consumer complaints during the period after CPP is implemented, because calling parties will be informed of charges "up front," rather than learning about them in subsequently issued bills.

In turn, the availability of specific rate information should help contribute to the success of CPP offerings because it will engender a greater level of consumer understanding and acceptance, while at the same time forestalling customer resentment and displeasure that could be caused by unexpected bills and that could undermine the success of the offerings.

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[146] As we have noted, many parties have also taken this position. See note 145, *supra*. In addition, the FTC has argued that:

> The main benefit of a disclosure would be to provide consumers with the material information necessary to decide whether to stay on the telephone or hang up before incurring charges. To make this decision, consumers would likely need accurate information about the cost that they will incur in placing *that particular call*. The FCC may wish to clarify that the disclosure would provide material information about the charges that will be incurred for that particular call.

FTC Comments at 13 (emphasis in original). *See* GWCA Comments at 2-3 (unpaginated); Ohio PUC Comments at 9; UCAN Comments at 2.

In advocating the disclosure of specific rate information, we recognize that there is debate regarding how "specific" this information can or should be.[147] In that regard, we believe that CTIA is mistaken in its claim that providing incomplete pricing information is inevitable in a CPP environment and also would be harmful to consumers.[148] As we noted in our comments, we believe that the best option for providing rate information would be for the notification to announce an overall per minute rate, calculated to include additional charges that may apply. The announcement could state, for example: "You will be billed 50 cents per minute for the call." The rate would include any additional charges (*e.g.*, roaming, long distance, or other charges) billed on a per minute basis. The announcement would not need to specify each of the separate components of the charge, because the caller would be apprised of the overall, "bottom line" per minute rate.[149]

We recognize that this approach would require facility capabilities to calculate the overall rate on a real time basis, but we believe that, to the extent such an approach is technically feasible,[150] it would constitute an optimal level of disclosure that would sufficiently inform calling

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[147] A number of parties have expressed concern about the disclosure of specific rate information in the calling party notification. *See, e.g.*, AirTouch Comments at 45; AT&T Comments at 5; GTE Comments at 18-19; Leap Comments at 9; Motorola Comments at 6; Nextel Comments at 9; Omnipoint Comments at 3; PCIA Comments at 27; VoiceStream Comments at 10-11.

[148] CTIA Comments at 23 n.56.

[149] Pilgrim Comments at 43-44.

[150] Pilgrim recognizes that parties have expressed concerns regarding the technical feasibility of providing specific, "real time" rate information, and we suggest that the Commission should consider engaging in further efforts to obtain data and expert evaluations regarding this question. *See* Cable & Wireless Comments at 3-4; PCIA Comments at 29; Sprint Comments at 5; US West Comments at 2 n.4.

parties of the charges they would incur if they chose to complete a call to a CPP subscriber. In our comments, we also advocated that the Commission should include a degree of flexibility in its notification requirements, to permit CMRS carriers to provide less than this optimum level of rate information.[151] We suggested such an approach because of our view that providing a lesser level of "real time" rate information might be more technically feasible for some carriers but would still provide data useful to the calling party in deciding whether to complete the call.

We believe that our preferred, "bottom line" option is as close to "full disclosure" as one would need to get in order to protect and serve the interests of consumers. Moreover, in response to CTIA's concerns that providing less than complete information would be harmful to consumers (because they would receive a misleading impression about the level of charges that might actually accrue), we believe that the two alternative rate disclosures we suggested in our comments, while not providing complete information regarding actual "bottom line" charges, still would provide useful information to assist the calling party in deciding whether to complete a CPP call, and thus must be viewed as being beneficial, rather than harmful, to consumers.[152]

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[151] Under one alternative, the notification would announce the per minute airtime rate, and the maximum additional rate that could apply to the call if additional charges were to accrue, depending on the circumstances of the call. This approach would require facilities capable of calculating the overall rate that could apply, but would not require the technical capability to determine in real time whether additional charges would actually apply to the call. Under a second alternative, the notification would announce the per minute airtime rate, and also notify the caller regarding each per minute or per message rate that could apply to the call. This approach would require facilities capable of identifying the level of each additional charge, but would not require the technical capability to calculate the overall rate that could apply or the ability to determine in real time whether any additional charges would actually apply. *Id.*

[152] *See* Ohio PUC Comments at 10 (if specific rates cannot be provided, callers should be advised of the highest per-minute and non-recurring charges that could be rendered for the call).

CTIA seems to be of the view that the use of a tone to notify calling parties that they are making a CPP call is a better disclosure device than specific rate information because any effort to provide rate information will always be incomplete, and therefore misleading. But, as we have noted, we believe that our alternative rate disclosures illustrate rate announcements that cannot be characterized as misleading or harmful to consumers.

Moreover, we believe that use of a tone holds a higher potential for consumer harm than the "incomplete" disclosure of rate information.[153] In our view, a consumer is better informed by an announcement that specifies, for example, the basic per minute rate and advises that additional charges may also apply, than by a tone that, one might say, signifies nothing. The use of a tone, in fact, may simply "postpone" consumer harm, in that it could lead to consumer confusion and dissatisfaction upon receipt of the monthly bill that represents the first disclosure of charges, but occurs after the fact rather than before the fact.

2. The Provision of Specific Rate Information May Serve as a Sufficient Basis To Establish Privity of Contract

Pilgrim agrees with CTIA that "it is important to ensure at the outset that any agreements reached between a CMRS provider and a calling party under CPP create binding obligations on both parties. Such considerations are especially crucial in the CPP environment as CMRS carriers will likely have no pre-existing relationship with the calling party."[154] We also agree with the Commission's suggestion that "providing the caller the rates, terms, and conditions prior to the

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[153] Some commenters have expressed their opposition to use of a tone as a notification mechanism. *See* NTCA Comments at 3; SBC Comments at 12 n.19 (use of a tone would not be sufficient to establish privity of contract).

[154] CTIA Comments at 28.

completion of a call would establish an enforceable contract between the caller and the carrier."[155]

Moreover, Pilgrim believes that the Joint Parties are correct in pointing out that a more stringent set of principles for privity of contract needs to be developed for CPP, in contrast to interexchange casual calling, because of differences between the two types of service.[156] With interexchange casual calling, the Joint Parties observe, calling parties always have the option of obtaining an IXC calling card; the calling party can select the network in advance, and can identify call charges in advance. The CPP calling party does not have such options.[157]

In these circumstances it becomes important for the Commission to ensure that sufficient mechanisms are in place to establish a contractual relationship between the CMRS provider and the calling party. The absence of such a relationship would threaten the viability of CPP offerings because it would call into question the entitlement of the carrier to collect a fee for services provided to the calling party.

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[155] *CPP Rulemaking Notice* at para. 51 (footnote omitted) (citing Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, Order on Reconsideration, 12 FCC Rcd 15014, 15031-32 (para. 28) (1997) (*Casual Calling Reconsideration Order*)). Pilgrim recognizes that some parties have argued that it is also necessary to establish privity of contract between the CMRS carrier and the party who has subscribed for the phone service used by the calling party in placing a call to a CPP subscriber. *See, e.g.*, Ad Hoc Telecommunications Users Committee and Association of Telecommunications Professionals in Higher Education (Ad Hoc Users) Comments at 11-12 (fundamental fairness requires that parties who will be charged for calls must have privity with the billing carrier; if the calling party is different from the billed party, the billed party, *e.g.*, an institutional subscriber, must be in privity with the wireless carrier); American Hotel & Motel Association (AHMA) Comments at 2; FTC Comments at 31-33. We discuss CPP issues relating to institutional and similar subscribers in Section V.C., *infra*.

[156] Joint Parties Comments at 32.

[157] *Id.* at 32-33.

In Pilgrim's view, there is a ready solution to this problem. As the Commission observed in the *Casual Calling Reconsideration Order*, providing information regarding rates, terms, and conditions to the calling party prior to completion of the CPP call may serve as a sufficient basis for establishing a contractual relationship. In this regard, it becomes important, we believe, for the rate information to be as detailed as possible.[158] Pilgrim has proposed that a "bottom line" rate quote should be provided to the calling party in real time, so that the calling party is informed of the per minute rate that will actually apply and that includes all rating elements that are applicable to the particular call. We believe that rate information crafted with this level of precision and accuracy would strengthen the argument that the calling party is making an informed decision to enter into a contract with the CMRS carrier if the calling party chooses to complete the call.

The reverse of this proposition is also true, and presents a risk for CMRS carriers. The more general the rate information becomes (or the more inaccurate or incomplete it becomes), the greater the likelihood that the calling party will not be able to make an informed decision to enter into a contract and the greater the possibility that the CMRS carrier will be barred from relying on privity of contract as a basis for seeking to collect charges from the calling party.[159]

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[158] *See* California Comments at 10. *But see* GTE Comments at 25-27.

[159] In addition, Pilgrim agrees with SBC that use of a tone or dedicated service codes would not be sufficient to establish privity of contract. SBC Comments at 12 n.19.

3. Uniform Notification Text Developed by Commission and State Staff Should Be Used as a "Safe Harbor" To Satisfy the Commission's Consumer Protection Objectives But Carriers Also Should Have Flexibility To Add to the Text

As Pilgrim has noted,[160] many parties have endorsed the four elements proposed by the Commission for calling party notification. One of the key issues relating to implementation of the four notification elements proposed by the Commission involves the actual text used to communicate the information encompassed in the four elements. The Commission must resolve whether all CMRS carriers should be required to utilize the same text for the notification message and, if so, the Commission also must decide how that text should be developed and prescribed.

Pilgrim supports the use of a standard text by all CMRS carriers as a "safe harbor" that would demonstrate compliance with the Commission's four notification elements. As we will discuss below, we also suggest that carriers be given the flexibility to add to the text in order to describe features of their CPP offering that may not be sufficiently encompassed by the Commission's prescribed text.

We support standardized text as a "safe harbor" because we believe that the universal use of a standard text would benefit consumers by eliminating any confusion that could be caused by the use of different messages. Such an approach would also eliminate the possibility of any disputes arising from contentions that the message developed and used by a CMRS carrier is not in compliance with the notification requirements. Removing the prospect of such disputes would in

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[160] See notes 145, 146, *supra.*

turn prevent the imposition of costs upon CMRS carriers caused by the need to defend against such non-compliance claims.

With regard to the actual text that should be employed, Pilgrim notes that staff of the Policy Division, Wireless Telecommunications Bureau, has worked with staff of the Georgia Public Service Commission, the Iowa Utilities Board, the Montana Public Utilities Commission, the Nevada Public Utilities Commission, and the Wisconsin Public Utilities Commission to develop specific language reflecting the four elements of the proposed uniform notification announcement.[161]

The discussions have led to tentative concurrence with respect to the following language:

> You are calling a customer of the wireless carrier [state name of the carrier]. The customer has chosen to have callers pay for [insert all the elements that will be charged as a separate line item to the caller, such as air time, roaming, long distance, etc.] If you complete this call you will be charged on your [insert where caller will be billed, such as local telephone bill, credit card bill, wireless carrier bill, etc.] $x.xx per minute, in addition to any charges by your chosen carrier for the local or toll call to reach this number. Press 1 if you agree to accept these charges, or hang up now to avoid any charges.[162]

[161] *See* Joseph Levin, Notice of Ex Parte Presentation — Oral Presentation with NARUC Representatives in Calling Party Pays Service Offering in the Commercial Mobile Radio Service, WT Docket No. 97-207, filed Sept. 17, 1999; David Siehl, Notice of Ex Parte Presentation — Oral Presentation with NARUC Representatives in Calling Party Pays Service Offering in the Commercial Mobile Radio Service, WT Docket No. 97-207, filed Sept. 17, 1999 (Siehl Ex Parte). CTIA has raised a procedural issue regarding the staff discussions reflected in the ex parte filings, and has requested that an erratum be filed clarifying the record of the proceeding. Letter from Brian Fontes, Senior Vice President for Policy and Administration, CTIA, to Thomas Sugrue, Chief, Wireless Telecomm. Bur., Federal Comm. Comm'n (Oct. 4, 1999).

[162] Siehl Ex Parte at 2 (minor typographical changes have been made in the text as it appears in the Siehl Ex Parte).

Pilgrim believes that the message options we proposed in our comments[163] are consistent with the proposed language,[164] and it also is our view that the proposed language represents an effective means of communicating to calling parties pertinent information that will enable them to make informed decisions regarding whether to complete calls placed to CPP subscribers. The text is particularly helpful in advising the calling party regarding the vehicle to be used in billing for the call, since this will likely reduce subsequent customer confusion and dissatisfaction upon receipt of the bill.

Although we suggested in our comments that carriers should be given flexibility to give calling parties either a "positive" or "passive" means of completing calls,[165] we support the approach taken in the proposed language, whereby the calling party would be instructed to press "1" to accept the charges and complete the call, or to hang up to avoid any charges.

Pilgrim also suggests, however, that a CMRS carrier be given the flexibility to add to the Commission's prescribed announcement text to the extent such additions are necessary or appropriate to advise the calling party of innovative features of the carrier's CPP offering.[166] For ex-

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[163] Pilgrim Comments at 42-44; see pages 59-60, *supra*.

[164] Our first option most closely resembles the type of rate information that would be captured in the per minute rate by the proposed text, except that our option would include other carriers' local or toll charges (to the extent they are billed on a per minute basis) in the "bottom line" per minute rate, if such a calculation is technically feasible, while the proposed language would separately state the possible applicability of these other carriers' charges.

[165] Pilgrim Comments at 45-46.

[166] We believe this suggestion is consistent with the approach to which Commission and State public utilities commission staff tentatively concurred. The Siehl Ex Parte indicates that the staff "tentatively concurred that a notification announcement would in some way *include* the . . . language" which is then set out. Siehl Ex Parte at 2 (emphasis added). Thus, the staff seems to contemplate that the standardized text could also include additional information.

ample, the carrier might provide the calling party with a menu of billing choices that could be reflected in the recorded message.[167] To take another example, a CPP provider with the capability of offering additional services (including enhanced services) might include a menu of additional selections for the calling party, which would be reflected in the recorded announcement. Thus, for example, if the called party is not available at the time the call is placed, the carrier might want to offer the calling party a choice of voicemail at no charge, text dispatch service at one price, or numeric paging at another price.

Pilgrim believes that flexibility is necessary to enable carriers to reflect innovative aspects of their CPP offerings in the recorded message. The Commission could provide this flexibility by prescribing a "safe harbor" announcement, and then also specifying required elements of any additional text, as a means of safeguarding consumer interests.

Finally, we note that Sprint opposes the prescription of a specific message text because, according to Sprint, carriers require the flexibility to modify the text over time in order to deal with customer reactions as the carriers' CPP offerings evolve in the marketplace.[168] Although, as we have discussed, Pilgrim believes that the better public policy is to establish a uniformly applicable text, we believe our proposal that this standard text be used as a "safe harbor," and that carriers be given flexibility to add to the standard text, would be responsive to the concerns raised by Sprint. There also may be additional ways to accommodate these concerns.

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[167] The calling party could be given the option to bill to his or her phone number, to bill to a credit card, to enter a PIN to have the call billed to the called party (see page 8, *supra*), or to use an announce-and-accept option that would treat the call in a manner similar to a collect call.

[168] Sprint Comments at 4 n.11.

For example, if the Commission does prescribe a standardized text, it could delegate to the Wireless Telecommunications Bureau the authority to revise the text from time to time, in response to requests and suggestions from State agencies, consumers, or the telecommunications industry. The scope of the delegation would not include the authority to reduce or substantively modify the elements required by the Commission's prescribed notification, but the Bureau could make other changes in the text in response to reactions to the recorded announcement in the marketplace. Such an approach would ensure protection of consumer interests but would also facilitate text revisions without the need for a full-blown Commission rulemaking proceeding.

C. Other Methods of Providing Notification Would Not Provide Adequate Consumer Protection

A number of parties, in opposing the four-element verbal notification to calling parties proposed by the Commission, have offered alternative approaches to attempt to advise calling parties that they will incur charges if they complete calls to CPP subscribers,[169] and have sug-

[169] *See, e.g.*, AirTouch Comments at 42 (CMRS carriers should be allowed to compete and experiment with various forms of notification to determine which are best received by consumers); CTIA Comments at 20 (the Commission does not need to regulate the notification announcement to the level of detail it has proposed; a more streamlined approach will better serve consumers and will avoid the impairment of CPP by well-meaning, but ultimately harmful, regulation); Nextel Comments at 3-5 (there is no need for any per-call recorded notification; bill inserts, informational mailings, and multi-media campaigns could be used; also could use 1+ dialing instead of any recorded message or tone, because this would be sufficient to alert the caller that he or she is making a "toll" call, even though CPP is different from toll or long distance calls); Omnipoint Comments at 4 (it would be sufficient to include an explanation of CPP in White Pages directories); USTA Comments at 11 (there should be an industry solution to notification); VoiceStream Comments at 11.

gested that any verbal notification requirement that the Commission may establish should be phased out after the CPP offerings have been in place for some period of time.[170]

Pilgrim believes that all these alternative approaches should be rejected by the Commission because they afford a lesser degree of consumer protection than the approach proposed in the *CPP Rulemaking Notice*, they may prove insufficient to establish privity of contract between CMRS carriers and calling parties, and they may ultimately threaten the success of CPP in the marketplace because they could cause a "backlash" among calling parties and a resulting reluctance on the part of wireless customers to subscribe to the service.

With respect to the argument that the Commission's four-element notification requirements should be phased out over time after CPP is introduced, Pilgrim continues to oppose such an approach, and we believe that the FTC has suggested a much more prudent course of action. The FTC argues that the Commission should defer any decision whether to permit a streamlined notification system because it is premature at this time to anticipate that there may not be a need for the disclosure of complete rate information at some time in the future.[171] Given the important consumer protections that attach to the provision of specific rate information, together with the

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[170] *See, e.g.*, CTIA Comments at 21 (the Commission should permit use of a distinctive tone as the notification method, with a general recorded intercept message being used initially for an 18-24 month period); GTE Comments at 18-20; Nextel Comments at 8-9 (if the Commission does adopt a verbal notification requirement, it should be phased out in 18 to 24 months); Sprint Comments at 6 (notice requirement should sunset after 18-24 months; distinctive tone and identification of the CMRS carrier would then be sufficient). Other parties have opposed any sunset date for the Commission's verbal notification requirements or any transition to a streamlined method of notification. *See, e.g.*, CPI Comments at 5; Connecticut DPUC Comments at 4; Joint Parties Comments at 4; NTCA Comments at 3; SBC Comments at 11; Washington UTC Comments at 4.

[171] FTC Comments at 14; *see* Ohio PUC Comments at 11.